In the Supreme Court of Iowa

NO: 22-1444

SUMMIT CARBON SOLUTIONS LLC
Petitioner-Appellant,

vs.

IOWA UTILITIES BOARD,
Respondent-Appellee,

And

SIERRA CLUB IOWA CHAPTER and
OFFICE OF CONSUMER ADVOCATE.
Intervenors-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HONORABLE DAVID NELMARK, JUDGE

BRIEF OF SIERRA CLUB IOWA CHAPTER

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ROUTING STATEMENT

Sierra Club proposes that this appeal be transferred to the Iowa Court of Appeals. Summit Carbon Solutions claims that the district court incorrectly applied the open records exemption in Iowa Code § 22.7(18). There are numerous cases addressing the application of that exemption. So this appeal simply involves the application of existing legal principles, which is the criterion for transfer to the Court of Appeals. Iowa Rule of Appellate Procedure 6.1101(3)(a).

Summit also claims that the public records in this case are exempt from disclosure under a common law balancing test. As will be shown in this Brief, there is no common law balancing test, and the only exemptions to the Open Records Law are the specific exemptions set forth in Iowa Code Chapter 22. The cases are clear on that point. See, *Am. Civil Liberties Union Found. of Iowa, Inc. v. Records Custodian, Atlantic Comm. School Dist.*, 818 N.W.2d 231 (Iowa 2012); *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42 (Iowa 1988); *DeLaMater v. Marion Civil Serv. Comm.*, 554 N.W.2d 875 (Iowa 1996); *In re Langholz*, 887 N.W.2d 770 (Iowa 2016). Again, this is an issue involving application of existing legal principles, and this appeal should be transferred to the Court of Appeals.

STATEMENT OF THE CASE

1. Procedural History

Summit Carbon Solutions LLC (Summit) proposes to construct a carbon dioxide pipeline traversing almost 700 miles through 29 counties in Iowa over the property of thousands of landowners. Pursuant to Chapter 479B of the Iowa Code, Summit must obtain a permit from the Iowa Utilities Board (IUB or Board). The initial step in the permit process is for the pipeline company to arrange for informational meetings in each county where the pipeline would be constructed. Iowa Code § 479B.4. To do that in this case, Summit prepared a list of the landowners in a corridor where the pipeline would be constructed so the landowners could be notified of the informational meetings (Summit Brief, p. 9). That landowner list was filed by Summit in the Board's official docket (Nov. 23, 2021 Board Order)(App. p. 34).

Sierra Club filed an open records request for the landowner list to the Board pursuant to Iowa's Open Records Law, Chapter 22 of the Iowa Code (Summit Petition, p. 4)(App. p. 8). In response to that request, the Board advised Summit that the landowner list would be released to Sierra Club if Summit did not seek injunctive relief in district court within 14 days

(Summit Petition, p. 4)(App. p. 8). Summit did file a petition for injunctive relief in the court below (Summit Petition)(App. p. 5). The district court did issue a temporary injunction on the grounds that if a temporary injunction were not issued, the landowner list would have to be produced and any further proceedings in the case would be moot (Temp. Inj. Order)(App. p. 135).

After overruling a motion for summary judgment, the district court held a trial on the merits and issued a permanent injunction (Perm. Inj. Order)(App p. 280). Summit then filed a Notice of Appeal to this Court (Notice of Appeal)(App. p. 295).

2. Statement of the Facts

As explained above, in order for Summit to obtain a permit to construct its proposed pipeline, it is required to obtain a permit from the Board pursuant to the procedures and requirements set out in Chapter 479B of the Iowa Code. The landowner list prepared by Summit and filed with the Board was requested by Sierra Club so that Sierra Club could support the landowners who were being harassed and pressured by Summit to sign easements. It is important for the landowner list to be made public so landowners can communicate with each other and support each other in the

face of harassment and intimidation by Summit and its agents. Summit's actions are described by comments in the IUB docket by some of the landowners (Sierra Club Temp. Inj. Ex. 2)(App. p. 48). Summit also used, or abused, its exclusive possession of the landowner list to send a letter signed by former governor Terry Branstad, who is described as a senior policy advisor to Summit, to all of the affected landowners (Sierra Club Temp. Inj. Ex. 3)(App. p. 55). Mr. Branstad's letter "warns" landowners that Sierra Club will intimidate and lie to them, and contains propaganda about the pipeline. This is a classic example of what psychologists call projection – taking your own bad actions and attributing them to someone else. In fact, landowners have welcomed Sierra Club's support, as shown by the landowner statements that were introduced in opposition to Summit's request for a temporary injunction in the court below (Sierra Club Temp. Inj. Ex. 4) (App. p. 57), and the affidavit of Jessica Mazour (Mazour affidavit)(App. p. 65).

In its Brief, Summit refers to Sierra Club as an "activist organization," a term apparently meant to be an insult. Actually, taking action is good citizenship. The district court, in its Order Granting Motion for Temporary

Injunction (Temp. Inj. Order, p. 6)(App. p. 140), eloquently described the facts:

> The proposed Summit pipeline and the competing projects have received a great deal of public attention. Summit acknowledges that a number of landowners oppose the project. In addition to the public purpose identified by Sierra Club – that the lists will help opponents of the project communicate with one another – the Court finds that knowing which land owners are impacted by the project helps the public evaluate the work of the Board. This exemption [Iowa Code § 22.7(6)] requires a showing that the release serves "no public purpose," not just a showing that the requester of the documents seeks them to advance private interests.
>
> Knowing which land is involved in a pipeline project can help the public assess whether the Board properly approved or rejected a project. It can help the public weigh the benefits and detriments of one project compared to another. Additionally, as stated by the Board, knowing the names of the landowners is required to assess whether the Board appropriately screened for conflicts of interest. The public has a right to know if these conflicts were properly addressed.

After oral argument on the request for a temporary injunction, the district court issued an order granting the temporary injunction (Temp. Inj. Order)(App. p. 135). That order was based on irreparable harm if the temporary injunction were not granted and the landowner list were released. As the court put it:

> If evidence revealed in the future shows the exemption [Iowa Code § 22.7(18)] does not, in fact, apply, the records could then be released. The reverse is, of course, not true. If the records were released now and that decision were shown to be in error, the toothpaste could not be put back in the tube.

(Temp. Inj. Order, p. 5)(App. p. 139).

The district court also noted in that order:

> As the matter proceeds, the parties can conduct discovery about the Board's procedures on this issue. A more detailed record may also be developed as to the record custodian's belief as to whether disclosing the lists would deter future voluntary communications.

(Temp. Inj. Order, p. 4)(App. p. 138). Summit did not raise § 22.7(18) to the Board until Summit's motion to reconsider the Board's November 23, 2021 order (Summit motion to reconsider)(App. p. 305). The Board did not address that argument because Summit had filed its petition for injunction in this case (Jan. 12, 2022 Board order)(App. p. 82).

After the temporary injunction was issued, the parties engaged in discovery. The case was then tried on July 7 and August 3 of 2022. The only witness in the July 7 proceeding was Jennifer Johnson, an attorney in the Office of Consumer Advocate (OCA). Ms. Johnson had previously been an assistant general counsel for the IUB (July 7 T. Tr. p. 5)(App. p. 203). Ms. Johnson testified from her experience as an attorney for the OCA and for the IUB that permit applicants would sometimes approach IUB staff and ask about what might be required in processing the application (July 7 T. Tr. p. 6) (App. p. 204). Ms. Johnson further testified that in her experience IUB staff

never asked for information it did not need (July 7 T. Tr. p. 8)(App. p. 206). Ms. Johnson could not recall any time when a permit applicant did not provide the information that staff requested at an initial interview (July 7 T. Tr. p. 9)(App. p. 207). Ms. Johnson stated:

> It's my experience that when a company comes in and asks for a meeting and tries to facilitate the procedure that they're seeking and the approval that they're seeking, or trying to expedite that process, they want to provide whatever will make that happen faster.

(July 7 T. Tr. p. 9)(App. p. 207).

In cross-examination by Sierra Club counsel, the following testimony was presented:

Q. During your time at the IUB, it's my understanding, from what you said in your direct testimony, that it was a common practice or procedure for the board or board staff to ask for information from applicants for a permit or certificate; is that correct?

A. If the board or board staff specifically was asked, board staff would respond and say those items that they would need to facilitate whatever it was that the company was looking to obtain from the board.

Q. And is it fair to say that that was treated as something that had to be submitted in order for the process to proceed?

A. Yes. I mean, those meetings would be considered informal, at least from board staff's perspective. That information that the board staff was seeking should by submitted in order to facilitate the process.

Q. So even though not written down or not formal, it was a requirement in order for the process to proceed? Is that a fair statement?

A. Generally speaking, that's a fair statement.

(July 7 T. Tr. p. 9-10)(App. p. 207-208).

On cross-examination by IUB counsel, Ms. Johnson said that when IUB staff would request information, the IUB would enforce that requirement through issuance of an order (July 7 T. Tr. p. 13)(App. p. 211). On further cross-examination by Sierra Club counsel Ms. Johnson said that if the information requested by IUB staff was something important to the process, if would be required (July 7 T. Tr. p. 15)(App. p. 213). Finally, in response to Summit's attorney, Ms. Johnson said that she did not believe IUB staff ever requested information that was beyond the scope of the IUB's jurisdiction (July 7 T. Tr. p. 16)(App. p. 214).

Summarizing, Ms. Johnson's testimony clearly establishes that requests for information by IUB staff to permit applicants was considered to be a requirement, to the point that if the information was not provided, the IUB would issue an order enforcing the requirement. So, in that context, the Board could not reasonably believe that a permit applicant would be discouraged from submitting the information.

At the August 3, 2022, session of the trial the only witness was Board Chair Geri Huser. Ms. Huser acknowledged that a request by the IUB for the

landowner list would be made to assist the IUB in doing its work (Aug. 3. T. Tr. p. 8-9)(App. p. 228-229). Ms. Huser agreed that if a request was made to a company to provide information and the information was not provided, the IUB could or would issue an order requiring the information to be provided (Aug. 3 T. Tr. p. 10-11)(App. p. 230-231).

Based on this evidence the district court determined that the IUB could not reasonably believe that Summit would not provide the information in the absence of confidentiality. In making that finding, the district court observed:

> The Board's [interrogatory] answer stated, in part:
>
> > The [Board] asserts that responsive replies were received in regard to each docket for which a response has been identified in the attached table of dockets, previously filed in response to the Motion for Summary Judgment in this case.
>
> In other words, in each docket where a landowner list was informally requested by the Board, it was received, despite the lack of any guarantee of confidentiality. The trial record contains no evidence that suggests any entity would refuse to provide such information going forward. Summit has the burden of proof. It has failed to carry that burden with respect to proving that the Board could "reasonably believe" information such as the Landowner List would not be provided in the absence of confidentiality.

(Perm. Inj. Order, p. 11-12)(App. p. 290-291).

Therefore, the district court, recognizing the presumption in favor of disclosure, denied a permanent injunction that would have prevented disclosure of the landowner list (Perm. Inj. Order)(App. p. 280).

ARGUMENT

I. THE DISTRICT COURT WAS CORRECT IN DETERMINING THAT THE LANDOWNER LIST WAS NOT EXEMPTED FROM THE OPEN RECORDS ACT PURSUANT TO IOWA CODE § 22.7(18).

A. Preservation of the Issue for Review

Because this issue was presented and tried to the district court and the court issued a ruling on the issue, this issue has been preserved for review. However, to the extent that Summit contends that the district court should not have decided this issue on the reasonable belief question because that question was allegedly not presented to the court, Summit has waived that argument. Summit should have filed a motion to reconsider, enlarge or amend pursuant to Iowa Rule of Civil Procedure 1.904(2). *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

Although this is not the usual situation where a motion to reconsider, enlarge or amend is filed to notify a court that the court overlooked an issue, Summit's argument that the district court decided an issue that allegedly was

not before the court, a motion to reconsider would have allowed Summit to present its argument on the issue.

B. Standard of Review

This was a case in equity so this Court reviews factual issues de novo. Iowa Rule of Civil Procedure 6.907. However, this issue is a matter of statutory construction which is reviewed for errors of law. *In re* Langholtz, 887 N.W.2d 770 (Iowa 2016); Carreras *v. IDOT*, 977 N.W.2d 438 (Iowa 2022).

C Argument

Chapter 22 of the Iowa Code, the Iowa Open Records Law, has as its purpose "to remedy unnecessary secrecy in conducting the public's business." *Am. Civil Liberties Union Found. of Iowa, Inc. v. Records Custodian, Atlantic Comm. School Dist.*, 818 N.W.2d 231, 232 (Iowa 2012). The law should be interpreted broadly in requiring disclosure, but the exceptions to disclosure in Iowa Code § 22.7 should be interpreted narrowly. *Id*. at 233. With respect to the exemption at issue in this case, § 22.7(18), this Court as said:

> 'There is a presumption in favor of disclosure' and 'a liberal policy in favor of access to public records.' *Mitchell[v. City of Cedar Rapids]*, 926 N.W.2d at 229 (quoting *Hall v. Broadlawns Med. Ctr.*, 811 N.W.2d 478, 485 (Iowa 2012)). But as to records exempt under section 22.7,

> "[t]he legislature has preformed its own balancing and made the policy choice to protect such records categorically." . . . In controversies such as the present one [involving section 22.7(18)], it is not the responsibility of this court to balance the competing policy interests. The balancing of those interests is the province of the legislature . . . ."

Ripperger v. Iowa Pub. Info. Bd, 967 N.W.2d 540, 550 (Iowa 2021).

The parties and the district court all agreed that the landowner list is a public record and that Sierra Club made a valid request for the list pursuant to Chapter 22. The relevant criteria for the exemption in § 22.7(18) to apply are:

1. A communication not required by law, rule, procedure or contract made to a government body

2. The communication was made by a person outside of government

3. The government entity receiving the information could reasonably believe the provider of the information would be discouraged from providing the information if the information were available to the general public.

Since Summit was the entity providing the information to the Board, it is an entity outside of government. So that criterion for the exemption was satisfied. During the oral argument on the request for a temporary injunction, the fighting issue based on that scant record was whether the Board had a procedure that required the submission of the landowner list (Temp. Inj.

Order, p. 4)(App. p. 138). After hearing evidence at trial, however, the district court found that, at least at the time Summit submitted the landowner list, the Board did not have a procedure requiring submission of the list (Perm. Inj. Order, p. 7-8)(App. p. 286-287).

But in the temporary injunction order the district court presciently observed:

> As the matter proceeds, the parties can conduct discovery about the Board's procedures on this issue. A more detailed record may also be developed as to the record custodian's belief as to whether disclosing the lists would deter future voluntary communications.

(Temp. Inj. Order, p. 4)(App. p. 138). With that language in the temporary injunction order, the district court gave Summit clear notice that the reasonable belief standard would be addressed in the final order and was not an issue that was decided in the temporary injunction order. And the burden was on Summit to prove the exemption applied, so it was obligated to address all of the open issues.

Furthermore, if Summit thought it was blindsided by the district court addressing the reasonable belief standard, it could have filed a motion to reconsider, enlarge or amend pursuant to Iowa Rule of Civil Procedure 1.904(2). The motion itself could have contained Summit's argument or Summit could have attached a brief to that motion. But Summit had made no

complaint about the district court's order in that regard until Summit's Brief in this appeal.

Nor did Sierra Club "slip[]" into its brief to the district court the argument that the Board could not have reasonably believed Summit would be discouraged from providing the information if it would be made available to the public. Summit Br. p. 24. That was clearly an issue left open by the district court and certainly relevant to the court's determination as to whether the §22.7(18) exemption applied.

In the temporary injunction order the district court made it clear it was deciding to grant the injunction primarily on the basis that not granting the injunction would make the case moot (Temp. Inj. Order, p. 5)(App. p. 139). The court also emphasized that the record on which it was granting the temporary injunction was simply oral argument and that further discovery and evidence at trial would inform the court's final decision on whether to grant a permanent injunction (Temp. Inj. Order, p. 4)(App. p. 138). Summit claims that the district court found that the reasonable belief prong of § 22.7(18) was satisfied in the temporary injunction order, but that the court then reached the opposite conclusion in the final order denying a permanent

injunction, allegedly on the same evidence. Summit Br. p. 24-25. But Summit's allegation is not correct.

In the order granting the permanent injunction the district court set out the evidence on which it based its decision. First, the court noted that the point of the exemption is whether the records custodian, the Board in this case, objectively could believe disclosure would discourage submission of the landowner list, citing *Ripperger v. Iowa Pub. Info. Bd.*, 967 N.W.2d 540 (Iowa 2021). And as the court observed, in this case there was no indication from the Board as to its belief in the matter and there was no testimony from any witness suggesting that Summit, or any similar company, would be unwilling to provide the landowner list if it were to be disclosed (Perm. Inj. Order, p. 9-10)(App. p. 288-289). To the contrary, the OCA presented the testimony of Jennifer Johnson and Sierra Club presented the testimony of Board Chair Geri Huser, supporting the position that the Board could reasonably believe the landowner list would be provided in the absence of confidentiality. In other words, Summit should have presented evidence that the Board could reasonably have believed that the landowner list would not have been provided if it would be released. That an open records exemption

is satisfied is not the default position. The entity asserting the exemption has the burden of proof and must present evidence to carry that burden.

The district court also emphasized that Summit provided the landowner list without any guarantee of confidentiality, and that even if the Board had wanted to provide confidentiality, it could not override the Open Records Law (Perm Inj. Order, p. 10)(App. p. 289). The court also referred to Summit's Interrogatory No. 3, which stated:

> For all dockets IUB listed in response to Sierra Club's interrogatories as being a docket where such information was provided, state whether the information was provided, and whether it was provided in the public docket or not. For any docket where the information was <u>not</u> provided on request, state what actions were taken or consequences suffered by the party that did not provide such a list.

The Board's answer was:

> The [Board] asserts that responsive replies were received in regard to each docket for which a response has been identified in the attached table of dockets, previously filed in response to the Motion for Summary Judgment in this case.

(Perm. Inj. Order, p. 11)(App. p. 290). So, the court concluded, "in each docket where a landowner list was informally requested by the Board, it was received, despite the lack of any guarantee of confidentiality."(Perm. Inj. Order, p. 11)(App. p. 290). The district court made a determination based on the evidence.

The three primary cases that have addressed § 22.7(18) support the district court's decision. Those cases are *City of Sioux City v. Greater Sioux City Press Club*, 421 N.W.2d 895 (Iowa 1988); *Des Moines Ind. Comm. Sch. Dist. v. Des Moines Register*, 487 N.W.2d 666 (Iowa 1992); *Ripperger v. Iowa Pub. Info. Bd.*, 967 N.W.2d 540 (Iowa 2021).

In *Sioux City* the city received employment applications for the position of city manager. In connection with the search for a city manager the city passed a resolution "determining that applications for city manager will be discouraged if available for general public examination." Of the 46 active applications submitted, nine of the applicants consented to public disclosure and 37 did not. The issue in *Sioux City* was whether the job applications were required by a law, rule, or procedure. The court held that they were not required; that no one was required to apply for the job.

The city's reasonable belief as to whether applicants would be discouraged from applying if they knew their information would be made public was not an issue in the case. The facts, however, as shown by the resolution passed by the city, were that the city council had been advised that applicants would be discouraged from applying in the absence of confidentiality and the council reasonably believed that to be the case. But

since reasonable belief was not an issue in the case, the court did not address it. The court did discuss the proper construction of § 22.7(18), in cautioning against an overly narrow construction of the exemption. In this case Summit has misinterpreted the *Sioux City* court's admonition. The *Sioux City* court was describing the proper scope of the types of information protected by the exemptions, not the reasonable belief prong of the exemption. In other words, § 22.7(18) covers a broad range of categories of information, but the reasonable belief prong is still subject to narrow interpretation.

Des Moines School District involved a request for records related to employment issues regarding school district personnel. Again, it appears that the reasonable belief prong of the exemption was not at issue in that case. Ultimately, the Supreme Court directed the district court to produce redacted copies of the requested documents.

The third case, *Ripperger v. Iowa Pub. Info Bd.*, is the only case to consider the reasonable belief question. The case arose from a request by a reporter for the list of persons who asked that their names be removed from the public name search on the assessor's website. The matter was referred to the Iowa Public Information Review Board, which held a hearing where the assessor called witnesses who testified that they asked for their names to be

removed from the assessor's public search function because of safety concerns. The three-justice majority (only four justices participated and Justice Mansfield dissented in part) held that the assessor could have reasonably believed the requests to be removed from the search function would have been discouraged if released. In making that finding the majority emphasized three points. *Id*. at 553-554.

First, the list of people who asked to be removed from the assessor's website sought anonymity or privacy for good reason to protect their safety. Second, when it was disclosed that the list of names might be published by the news media, many on the list sought to be removed from the list. Third, the assessor's website promised that the requests to be removed from the list would be kept confidential. It should also be noted that Mr. Ripperger, the assessor, testified that he was directly requested by the people who wanted their names removed, so he knew they wanted confidentiality for good reason.

In this case, on the other hand, the facts are quite different. As stated by the district court, Summit presented no evidence as to the Board's belief as to whether release of the information could deter Summit or other pipeline applicants from submitting the information, nor any evidence as to how

release of the landowner list would adversely impact Summit (Perm Inj. Order, p. 9-10)(App. p. 288-289). In fact, Summit did not even raise § 22.7(18) before the Board as a basis for confidentiality until its motion to reconsider (Summit motion to reconsider)(App. p. 305). Summit claims that its motive in requesting confidentiality of the landowner list was to protect the privacy of landowners. But Summit presented no evidence supporting that allegation. For example, Summit could have submitted affidavits from landowners, with identifying information redacted, verifying that the landowners did not want their information released. Summit did file an affidavit in support of its request for a temporary injunction (Ketzner affidavit)(App. p. 302), but it contained no evidence that landowners did not want their identifying information revealed. It contained only speculative and hypothetical statements. On the other hand, Sierra Club has submitted statements from landowners showing that they want to be able to work with Sierra Club to protect all of the landowners (Sierra Club Temp. Inj. Ex. 2, 4) (App. p. 48, 57). And the affidavit of Jessica Mazour confirmed that (Mazour affidavit)(App. p. 65). The district court also observed:

> In addition to the public purpose identified by Sierra Club – that the lists will help opponents of the project communicate with one another – the Court finds that knowing which land owners are impacted by the project helps the public evaluate the work of the Board.

(Temp. Inj. Order, p. 6)(App. p. 140). Summit bears the burden of proving that the exemption is satisfied. It failed to carry that burden.

In this case, it is not a question of whether the landowners would participate in having their land taken for an easement if they knew their names would be made public. They had no choice. Summit put them in that position. Now Summit wants to keep the information confidential so the landowners cannot communicate with each other. The record is clear that the landowners want the names to be public. It should be obvious that Summit does not care about the landowners' privacy. Summit's motive is to prevent the landowners from communicating with each other and joining in responding to Summit's propaganda and harassment. Comments and objections from landowners (Sierra Club Temp. Inj. Ex. 2, 4)(App. p. 48, 57) show the actions by Summit's agents that landowners have been subjected to. And when Summit sends the landowners, whose names and addresses it has, but landowners don't have, misinformation like the letter from former Governor Terry Branstad (Sierra Club Temp. Inj. Ex. 3)(App. p. 55), landowners cannot respond to other landowners whose names and addresses they don't have. Surely, § 22.7(18) was not meant to allow this kind of asymmetrical power over the landowners.

The district court also emphasized that when Summit submitted the landowner list to the Board, Summit had no guarantee that the list would be confidential (Perm. Inj. Order, p. 10)(App. p. 289). Summit claims it was between a rock and a hard place – that it did not want to provide the landowner list without confidentiality but it wanted to cooperate with the Board that would determine if it receives a permit to build its pipeline. Exactly. Summit is effectively admitting that it would have submitted the list even without confidentiality in order to comply with the Board's request. And, as the district court observed, the Board could not grant confidentiality in violation of the Open Records Law in any event (Perm. Inj. Order, p. 10) (App. p.). The district court also pointed to the testimony of Board Chair Geri Huser at trial where she indicated that in each case where a landowner list was informally requested by the Board, it was received, despite the lack of any guarantee of confidentiality (Perm. Inj. Order, p. 11)(App. p. 290).

Unfortunately, Summit's Brief at p. 42-45, seriously miscontrues the district court's reasoning and this Court's discussion in *Ripperger*. First, Summit claims the district court failed to consider what the Board could objectively reasonably believe because the record did not concretely address what the Board actually believed. But it was Summit that failed to make that

record and carry its burden of proof. Summit is like the boy who killed his parents and then asked the court for mercy because he was an orphan. Summit should have presented testimony form the Board or Geri Huser.

Summit quibbles over the district court's phrasing of the test as what the Board "would" reasonably believe, instead of what the Board "could" reasonably believe. However, a review of the district court's entire discussion shows that the court applied the language of § 22.7(18) and the *Ripperger* decision correctly. What Summit essentially argues is that because it didn't present any evidence on what the Board could reasonably believe and therefore left the district court to speculate, the court erred in speculating that the Board could reasonably believe disclosure of the landowner list would discourage submission of the list. Therefore, taking Summit's argument to its logical conclusion, if a pipeline company presents no evidence as to the Board's reasonable belief, a court is essentially required to find that the Board could have a reasonable belief.

Next, Summit claims that the *Ripperger* court held that there need only be "some evidence" to support a finding that the record custodian had a reasonable belief, and that the district court allegedly used a higher standard. But Summit is taking the language from *Ripperger* out of context. The

"some evidence" language is taken from Footnote 6 in *Ripperger*. That footnote was related to the following text in the opinion:

> When, as here, the record custodian could reasonably believe disclosure of the list would deter such communications, that determination should be upheld, not second-guessed, even if others could reasonably disagree with the custodian.

Id. at 553. Then, the footnote talks about weighing conflicting evidence in the context of a motion to dismiss or summary judgment. The footnote then concludes:

> Similarly, courts reviewing a custodian's determination under Iowa Code section 22.7(18) should not independently decide whether the communication at issue would be deterred by disclosure, but rather should decide whether some evidence existed to support the custodian's belief.

Id.

The record is clear in this case that the district court in this case did not substitute its own judgment for that of the Board. The judge considered what evidence there was and concluded that the Board could not reasonably believe that the landowner list would not be provided if it were released to the public.

In summary, Summit has failed to carry its burden to show that the exemption in § 22.7(18) is satisfied in this case.

II. THERE IS NO COMMON LAW BALANCING TEST UNDER THE OPEN RECORDS LAW.

A. Preservation of the Issue for Review

Sierra Club agrees that Summit preserved error on this issue generally. However, to the extent that Summit relies on Iowa Code § 22.8 as providing an independent remedy for violation of the Open Records Law, Summit has waived that argument. Summit did not present any evidence at trial on that point, nor make any mention of § 22.8 in its post-trial brief, and the district court did not mention § 22.8 in its order denying a permanent injunction. Summit should have filed a motion to reconsider, enlarge or amend pursuant to Iowa Rule of Civil Procedure 1.904(2). Because it did not, this argument in waived. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

B. Standard of Review

This was a case in equity so this Court reviews factual issues de novo. Iowa Rule of Civil Procedure 6.907. However, this issue is a matter of statutory construction which is reviewed for errors of law. *In re Langholtz*, 887 N.W.2d 770 (Iowa 2016); *Carreras v. IDOT*, 977 N.W.2d 438 (Iowa 2022).

C Argument

Summit claims that there is a common law balancing test for privacy interests unconnected to the specific exemptions in § 22.7. Summit further

relies on the Board's order initially granting confidentiality (Nov. 23, 2021 Board Order)(App. p. 34), claiming that the Board conducted this alleged common law balancing test.

Regarding the Board's order, the order did not rely on, or even mention, any provision of the Open Records Law to support its decision that the names and addresses of individual landowners would not be released. The Board was therefore saying that it was not bound by the requirements of the Open Records Law. Nor did the Board refer to or rely on its own rules set forth in 199 I.A.C. § 1.9. The Board was therefore acting without any attempt to comply with the Open Records Law. The IUB seemed to be creating its own body of law in conflict with the Open Records Law. It cannot do that. The IUB is clearly a government body within the requirements of the Open Records Law. The Open Records Law controls what records must be released and what records come within the designated exceptions. And those exceptions must generally be given a narrow interpretation. *Greater Comm. Hosp. v. PERB*, 553 N.W.2d 869 (Iowa 1996). So Summit cannot get away with relying on the Board's own unjustifiable balancing test.

Nor do the cases cited by Summit support its argument for a common law balancing test. In *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42 (Iowa 1999), *ACLU Foundation of Iowa v. Records Custodian*, 818 N.W.2d 231 (Iowa 2012), and *DeLaMeter v. Marion Civ. Srv. Comm'n.*, 554 N.W.2d 875 (Iowa 1996), the specific open records exemption at issue was Iowa Code § 22.7(11). That section protects personal information in confidential personnel records relating to individuals employed by the government body. The only issue in the foregoing cases was whether the specific information requested came within the definition of "personal information" as used in that exemption. Those cases had nothing to do with the kind of information at issue in this case.

In *DeLaMeter* the plaintiff sought test scores for an examination for promotion in the Marion Police Department. The court determined that the term "personal information" in § 22.7(11) was not defined in the statute. Therefore, the court used a balancing test to determine if the information sought was personal information for which privacy should be afforded. The balancing test was used only to determine if the records requested were personal information that would be subject to the privacy exemption in § 22.7(11).

Clymer involved a request for records of sick leave taken by employees of the City of Cedar Rapids. The court engaged in a balancing test, within the context of § 22.7(11), again because that statute does not define the terms "personal information" and "confidential personnel records," as used in the statute. However, § 22.7(18), on which Summit relies, contains no reference to personal information or any other reference that would implicate the determination of personal privacy.

Finally, in *ACLU Foundation of Iowa,* the documents sought were records of a strip search of students and the identities of the school employees who conducted the search. In that case the court declined to conduct a balancing test because the records sought to be produced clearly came within the statutory exemption of § 22.7(11). The court stated that it is not the responsibility of the court (or the IUB) to balance competing policy interests when the legislative intent of the statute is clear.

In *ACLU Foundation of Iowa v. Records Custodian*, 818 N.W.2d 231, 234 (Iowa 2012), the court said, "[I]t is not our responsibility to balance competing policy interests. This balancing is a legislative function and our role is simply to determine the legislature's intent about those policy issues." The court in that case went on to explain even more clearly:

> The annotation we cited in *DeLaMater* based its test on the fact that "[a] majority of state freedom of information laws include some form of privacy exemption, and, with few exceptions, the exemptions closely track the Federal Freedom of Information Act's sixth exemption." . . . The Iowa Open Records Act's privacy exemption does not track the Federal Freedom of Information Act (FOIA). FOIA's provision relating to personnel records exempts from disclosure "personnel and medical files and similar files the disclosure *of which would constitute a clearly unwarranted invasion of personal privacy*." 5 U.S.C. § 552(b)(6) (2006) (emphasis added). The exemption for personnel, medical, and similar files is qualified, and a court must determine whether disclosure of a document would constitute a "clearly unwarranted" invasion of privacy. See *id*. This language requires a balancing test. The Iowa Open Records Act does not have the qualifying language of FOIA. **Therefore, we question whether Iowa even has a balancing test.** (emphasis added).

Id. at n. 2.

To the extent that Summit relies on the dissent in *ACLU Foundation of Iowa,* that reliance is misplaced. First, the dissent made clear that the basis of it position was the "new age of open government in Iowa." *Id*. at 236. In other words, if there is a balancing test it must be geared toward disclosure of public records. Second, and more importantly, the dissent was based on the specific provisions of Iowa Code § 22.7(11) defining "personal information," and the prior caselaw interpreting that exemption. So the majority opinion and the dissent in *ACLU Foundation of Iowa* were narrowly focused on interpreting a specific term in a specific exemption. Neither opinion is relevant to the determination in this case as to whether the

IUB could reasonably believe release of the landowner list would discourage submission of the list. That has nothing to do with interpreting any language in the exemption. It is significant that none of the cases addressing § 22.7(18) conducted any sort of balancing test. *City of Sioux City v. Greater Sioux City Press Club*, 421 N.W.2d 895 (Iowa 1988); *Des Moines Ind. Comm. Sch. Dist. v. Des Moines Register*, 487 N.W.2d 666 (Iowa 1992); *Ripperger v. Iowa Pub. Info. Bd.*, 967 N.W.2d 540 (Iowa 2021). Unlike § 22.7(11), § 22.7(18) has no reference to personal information or any inference that it relates to personal privacy. So there was no need to engage in a balancing test.

In addressing Summit's argument for a common law balancing test the district court agreed with Sierra Club's analysis. The court concluded that it could not find any cases where a balancing test was used independent from one or more of the statutory exemptions in § 22.7 (Perm. Inj. Order, p. 7) (App. p. 286).

Summit mentions one other case that does not support Summit's argument, *In re Langholtz*, 887 N.W.2d 770 (Iowa 2016). In *Langholtz* an injunction was sought to seal a court ruling that contained reference to a minor child. The Supreme Court found that no exemption under § 22.7

applied in that case. But the court went on to determine that if the sole injunctive relief sought is under Iowa Code § 22.8, the district court must conduct a hearing and make factual findings as provided under that section.

Unlike the facts in *Langholz*, however, there is a statutory exemption that applies in this case, § 22.7(18). Even though, by its terms, it does not prevent disclosure of the landowner list, it applies to the type of document exemplified by the landowner list. To argue that a statutory exemption applies only if it actually does prevent disclosure would make any analysis of the exemption meaningless. As in this case, when the document at issue is provided to the government body and is not required by any law, rule, procedure or contract and the record custodian could reasonably believe it would not be provided absent confidentiality, the exception is satisfied and there is no need for a balancing test to resolve any uncertainty. And just because the district court found that the statutory exception was not satisfied, that does not give Summit a second bite of the apple in the form of a balancing test.

Regarding the *Langholz* court's reliance on § 22.8, Summit has two problems. First, the district court did not address, or even refer to, § 22.8, and Summit did not make any argument related to that section in its post-trial

brief (Summit Post-trial Brief)(App. p. 246). Although Summit did make some reference to § 22.8 in its request for a temporary injunction (Temp. Inj. Motion, p. 1, 16)(App. p. 16, 31), it did not address the requirements to comply with that statute. It simply recited the two requirements for an injunction in § 22.8, but did not set out any evidence or argument as to why those requirements were satisfied. All of the preceding sections of the motion for temporary injunction, dealt with the statutory exemptions under §§ 22.7 (6) and 22.7(18), and the non-existent common law balancing test. And Summit certainly did not explain how it had proven the § 22.8 requirements by clear and convincing evidence.

Since Summit did not squarely address § 22.8 and the district court did not address it in the permanent injunction order, Summit should have filed a motion to reconsider, enlarge or expand pursuant to Iowa Rule of Civil Procedure 1.904, but did not. See, *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

Summit's second problem in relying on § 22.8 is that it has not even come close to satisfying the requirements of the statute. Section 22.8 provides, in pertinent part:

> Such an injunction may be issued only if the petition supported by affidavit shows and if the court finds both of the following:

> a. That the examination would clearly not be in the public interest.
> b. That the examination would substantially and irreparably injure any person or persons.
>
> **********
>
> [T]he district court shall take into account the policy of this chapter that free and open examination of public records is generally in the public interest even though such examination may cause inconvenience or embarrassment to public officials or others. A court may issue an injunction restraining examination of a public record or a narrowly drawn class of such records, only if the person seeking the injunction demonstrates by clear and convincing evidence that this section authorizes its issuance.

Summit did not prove **by clear and convincing evidence** that release of the landowner list would not be in the public interest, nor that release would substantially and irreparably injure any person or persons.

First, Summit did not prove that release of the landowner list would **clearly** not be in the public interest. On the contrary, the district court identified the public interest in having the list to help opponents of the pipeline project communicate with each other and in allowing the public to evaluate the work of the Board (Temp. Inj. Order, p. 6)(App. p. 140). It is also important to note that the legislature has expressly stated that it granted the Board authority over the permitting of hazardous liquid pipelines to protect landowners from the impacts of the pipelines. Iowa Code § 479B.1.

It is therefore in the public interest for landowners to be able to effectively protect their interests before the Board.

Second, Summit did not prove that release of the list would substantially and irreparably injure any person or persons. On the contrary, as demonstrated throughout this brief, the evidence shows that the landowners would be substantially and irreparably harmed if the landowner list is not released.

Although Summit referred to the decision in *Langholz* in its brief, it did not acknowledge or discuss the *Langholz* court's reliance on § 22.8. Summit incorrectly cites *Langholz* as alleged support for the common law balancing test. But *Langholz* did not rely on a common law test. The decision was based entirely on § 22.8. And as the court described:

> If a public record does not fall under one of the stated exemptions, the district court may still grant an injunction to restrain the examination of the record. Iowa Code § 22.8(1). This injunction is an equitable remedy that is independent of the section 22.7 exceptions. . . . The petition requesting the injunction should support these findings, and the district court should hold a hearing to determine whether the burden has been met.

Id. at 776. In this case, Summit did not present evidence or argument that satisfied the requirements of § 22.8, and the district court did not hold a

hearing to determine if Summit met its burden with respect to those requirements. So any reliance on *Langholz* is entirely unjustified.

In support of its argument for a balancing test, Summit has taken words and phrases from cases not involving § 22.7(18) out of context. Summit pulls from *Clymer* the five-factor balancing test, but fails to explain that the test was only used to determine how to apply the personal information portion of § 22.7(11). Summit Brief p. 51. After that, Summit pretends to analyze *ACLU Foundation of Iowa*, claiming that the district court based its ruling on that case. Summit Brief p. 52. In fact, the only reason the district court discussed *ACLU Foundation of Iowa* was because Summit tried to rely on it (Temp. Inj. Order, p. 8)(App. p. 142). Summit's reliance on that case was, of course, misplaced. *ACLU Foundation of Iowa*, like *Clymer* and *DeLaMater,* dealt with § 22.7(11), not § 22.7(18).

Summit also claims that the majority opinion in *ACLU Foundation of Iowa* and the dissent disagreed about when the analytical framework applies in interpreting the terms of § 22.7(11). In that regard, it is not clear what point Summit is trying to make. The majority in *ACLU* held that the type of document sought in that case was clearly personal information, so no balancing test was necessary. The dissent believed that, in light of precedent,

the balancing test should be used. But, again, that case specifically dealt with § 22.7(11), not § 22.7(18). So it is irrelevant to the issues in this case and provides no support for the argument that there is a common law balancing test that should have been used in this case.

Finally, Summit points to a paragraph in *Langholz* that mentions the balancing test from *Clymer* and *DeLaMater.* But the *Langholz* court did not apply the five-factor balancing test. It applied the requirements in § 22.8, as discussed above. In this case, Summit did not preserve the application of § 22.8 as an issue in this appeal, and in any event, Summit cannot satisfy the strict requirements of § 22.8. *Langholz* does not support Summit's argument for a common law balancing test.

Based on the foregoing, Summit's attempt to apply the five balancing test factors to this case is irrelevant and the Court need not consider it.

CONCLUSION

The district court was correct in determining that the landowner list at issue is a public record that must be released. Summit's arguments to the contrary are replete with misstatements, diversions, and incorrect statements of the law and the facts. This Court should affirm the decision of the district court.

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REQUEST FOR ORAL ARGUMENT

Sierra Club respectfully requests oral argument on all of the issues in this appeal.

/s/ Wallace L. Taylor
WALLACE L. TAYLOR

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in font size 14 and contains 7,872 words, excluding parts of the brief exempted by Iowa R. App. P. 903(1)(g)(1).

Dated June 30, 2023.

/s/ *Wallace L. Taylor*
WALLACE L. TAYLOR

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of June, 2023, I electronically filed this brief with the Supreme Court of Iowa, and that a copy of the brief was served electronically onall registered counsel of record.

Dated June 30, 2023.

/s/ *Wallace L. Taylor*
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